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Attorneys for Debtor
WEST CONTRA COSTA HEALTHCARE
DISTRICT

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

In re:
WEST CONTRA COSTA HEALTHCARE
DISTRICT.

Debtor.

Tax ID: 94-6003145

Case No. 16-42917

Chapter 9

**MOTION FOR ORDER AUTHORIZING
REJECTION OF OMNICELL AGREEMENTS
EFFECTIVE *NUNC PRO TUNC* TO THE
PETITION DATE**

Date: January 11, 2017

Time: 1:30 p.m.

Place: 1300 Clay Street, Courtroom 201

Judge: Hon. Roger L. Efremsky

TO OMNICELL, INC., THE HOLDERS OF THE TWENTY LARGEST UNSECURED
CLAIMS IN THIS CHAPTER 9 CASE, U.S. BANK, THE COUNTY OF CONTRA COSTA,
AND ALL PERSONS HAVING FILED AND SERVED REQUESTS FOR NOTICE IN THIS
CHAPTER 9 CASE

The West Contra Costa Healthcare District, a California Local Health Care District and the
debtor in the above-captioned Chapter 9 case (the "District"), hereby seeks an order, pursuant to

1 Section 365(a) of the Bankruptcy Code, Rules 6006(a) and (c) of the Federal Rules of Bankruptcy
2 Procedure, and Rule 9014-1 of the Bankruptcy Local Rules for the Northern District of California
3 authorizing the District to reject certain executory contracts between the District and Omnicell,
4 Inc. (“Omnicell”). In support of this Motion, the District relies upon the Declaration of Kathy D.
5 White in Support of Statement of Qualifications Under 11 U.S.C. § 109(c) filed on October 20,
6 2016 [Docket No. 5] (the “White Declaration”) and respectfully states as follows:

7 **RELIEF REQUESTED**

8 Prior to the Petition Date, and while the hospital owned by the District and known as
9 Doctor’s Medical Center (the “Hospital”) was still operating, the District entered into certain
10 agreements with Omnicell whereby the District leased machines from Omnicell used by the
11 District to dispense medication to patients (the “Omnicell Equipment”). When the Hospital closed
12 in 2015, the District had no further use for the Omnicell Equipment and attempted to return the
13 Omnicell Equipment to Omnicell and terminate the Omnicell agreements. Omnicell refused to
14 consent to the termination of the agreements and refused to retake possession of the Omnicell
15 Equipment. The District has no use for the Omnicell Equipment, which sits unused in the vacant
16 Hospital, and the Omnicell agreements are burdensome to the District. By this Motion, the
17 District seeks to reject the Omnicell agreements *nunc pro tunc* to the Petition Date and return the
18 Omnicell Equipment to Omnicell.

19 This Motion is made pursuant to Section 365(a) of the Bankruptcy Code, Rules 6006(a)
20 and (c) of the Federal Rules of Bankruptcy Procedure, and Rule 9014-1 of the Bankruptcy Local
21 Rules for the Northern District of California.

22 **STATEMENT OF FACTS**

23 In support of this Motion, the District represents as follows:

24 1. The District filed its voluntary petition under Chapter 9 of the United States
25 Bankruptcy Code on October 20, 2016 (the “Petition Date”). The District filed this Chapter 9 case
26 in order to obtain relief from creditor collection actions and access to certain revenues needed to
27 operate to provide the District with time to effect a Plan of Adjustment of the District’s debts.

28 2. As set forth in the White Declaration, the District is a special health care district

1 created in accordance with California's Local Health Care District Law. The District has
2 historically operated the Hospital located in San Pablo and provided medical services to the
3 community. In April 2015, with the Hospital continuing to lose money and the District unable to
4 secure additional financing, the District made the difficult decision to shut down operations at the
5 Hospital.

6 3. Prior to the Petition Date and the closure of the Hospital, the District and Omnicell
7 entered into that certain undated Corporate Partnership Agreement, that certain Omnicell Master
8 Agreement dated August 2, 2005, and that certain Equipment Lease Agreement dated March 28,
9 2011 (collectively and together with any and all other contracts, leases, or agreements between the
10 District and Omnicell, the "Omnicell Agreements"). Pursuant to the Omnicell Agreements, the
11 District leased the Omnicell Equipment and procured related services necessary to use the
12 Omnicell Equipment in connection with the District's operation of the Hospital.

13 4. When the Hospital closed in April 2015, the District attempted to return the
14 Omnicell Equipment to Omnicell and terminate the Omnicell Agreements. Omnicell refused to
15 consent to the termination of the Omnicell Agreements and refused to retake possession of the
16 Omnicell Equipment.

17 5. Under the Omnicell Agreements, the District is required to pay Omnicell monthly
18 rent for the Omnicell Equipment in the approximate amount of \$22,000 per month.

19 6. The District has no use for the Omnicell Equipment, which sits unused in the
20 closed Hospital, and the Omnicell Agreements are burdensome to the District.

21 MEMORANDUM OF POINTS AND AUTHORITIES

22 A. Rejection of the Omnicell Agreements is Appropriate

23 Section 365 of the Bankruptcy Code provides:

24 Except as provided in sections 765 and 766 of this title and in subsections (b), (c),
25 and (d) of this section, the trustee, subject to the court's approval, may assume or
reject any executory contract or unexpired lease of the debtor.

26 11 U.S.C. § 365(a).

27 Under section 365 of the Bankruptcy Code, the rejection of an executory contract or
28 unexpired lease is subject to the business judgment test. *NLRB v. Bildisco & Bildisco*, 465 U.S.

1 513, 524 (1984) (business judgment standard applies to the rejection of executory contracts with
2 the exception of collective bargaining agreements); *Group of Institutional Investors v. Chicago,*
3 *Milwaukee, St. Paul & Pacific R.R. Co.*, 318 U.S. 523, 550 (1943) (“the question whether a lease
4 should be rejected and if not on what terms it should be assumed is one of business judgment”); *In*
5 *re County of Orange*, 179 B.R. 177, 183 (Bankr. C.D. Cal. 1995) (finding *Bildisco* applicable in a
6 Chapter 9 case). The primary issue the Court should consider in evaluating the District’s business
7 judgment is whether rejection of the Omnicell Agreements will benefit unsecured creditors. *See*
8 *In re Chi-Feng Huang*, 23 B.R. 798, 801 (9th Cir. B.A.P. 1982).

9 In this case, rejection of the Omnicell Agreements is clearly in the best interest of
10 creditors. The District is no longer operating the Hospital and is not using the Omnicell
11 Equipment. The District has attempted unsuccessfully to return the Omnicell Equipment and has
12 no use for it. The Omnicell Agreements are burdensome to the District because the District is
13 required to pay monthly rent for equipment that the District does not need and is not using.
14 Rejection of the Omnicell Agreements is therefore a valid exercise of the District’s business
15 judgment.

16 **B. Rejection Should Be Effective as of the Petition Date**

17 While rejection of a contract or lease under Section 365(a) is not effective until an order
18 approving the rejection is entered, a bankruptcy court has the equitable power to order rejection to
19 operate retroactively. *In re At Home Corp.*, 392 F.3d 1064, 1065 (9th Cir. 2004); *In re Thinking*
20 *Machines Corp.*, 67 F.3d 1021, 1029 (1st Cir. 1994). Factors considered by bankruptcy courts in
21 determining whether retroactive rejection is appropriate include the absence of delay by the debtor
22 in promptly seeking rejection, whether the debtor is enjoying the use or benefit of the contract or
23 lease postpetition, and the conduct of the landlord or contract counterparty. *See At Home*, 392
24 F.3d at 1073-76.

25 Here, the District has promptly moved for rejection of the Omnicell Agreements. The
26 deadline for objecting to the Petition was November 30, 2016. Because no objections to the
27 Petition were filed on or before November 30, the Order for Relief went into effect on December
28 1, retroactive to the Petition Date. (*Order Granting Ex Parte Application for Entry of Order:*

1 (1) *Directing and Approving Form of Notice*; (2) *Setting Deadlines for Filing Objections to*
2 *Petition*; (3) *Setting Deadline for Filing List of Creditors*; (4) *Setting Deadline for Filing Proofs of*
3 *Claims*; and (5) *Limiting Notice* entered on October 25, 2016 [Docket No. 12]). The District filed
4 this Motion on December 1, the first day in which the District was certain an Order for Relief had
5 been entered. With respect to the second factor considered by courts in granting retroactive relief,
6 whether the debtor is enjoying the use or benefit contract or lease postpetition, the District has not
7 used the Omnicell Equipment since the Hospital closed in April 2015. Finally, with respect to the
8 conduct of Omnicell, the District has attempted to return the Omnicell Equipment to Omnicell and
9 terminate the Omnicell Agreements but Omnicell has refused to cooperate. Under these
10 circumstances, rejection of the Omnicell Agreements *nunc pro tunc* to the Petition Date is
11 appropriate.

12 CONCLUSION

13 In the business judgment of the District, rejection of the Omnicell Agreements is in the
14 District's best interests. Therefore the District requests that the Court enter an order authorizing
15 the District to reject the Omnicell Agreements effective as of October 20, 2016, the Petition Date
16 in this Chapter 9 case, and for such other relief as is appropriate.

17
18 Dated: December 1, 2016

DENTONS US LLP

19 By: /s/ Samuel R. Maizel
20 Samuel R. Maizel
21 Attorneys for Debtor
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